82-2011

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

In the Matter of a Grand Jury Subpoena Directed to

MARC RICH + CO. A.G., A Swiss Corporation.

MARC RICH + CO. A.G.,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a judge-made rule of long-arm jurisdiction may serve to sustain service in 1982 of a federal grand jury subpoena upon an alien corporation not "present" or doing business in the United States, based upon alleged acts for the corporation in, or affecting, the United States in 1980.

2. Whether a "reasonable probability that ultimately" the government can prove *in personam* jurisdiction is sufficient to sustain a grand jury subpoena summoning an alien corporation, where the subpoena is then enforced without further proof of jurisdiction.

3. Whether the use of *in camera* evidence, on unparticularized grounds of grand jury secrecy, to establish the "reasonable probability" of jurisdiction held sufficient by the court of appeals, denied petitioner's rights to confrontation and to the due process of law.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Marc Rich + Co. A.G.[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 4, 1983.

1 Pursuant to Rule 28.1 of the Rules of this Court, it is stated that petitioner is a privately-held corporation, which has none but wholly-owned subsidiaries; any affiliates are likewise privately held.

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted as Appendix A hereto. It affirms a decision of the United States District Court for the Southern District of New York dated August 25, 1982 (also not reported), which is reprinted as Appendix B hereto. The latter opinion was originally sealed; the parties agreed that it could be unsealed at the time of the decision in the Court of Appeals.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 4, 1983.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTE AND RULE INVOLVED

Relevant portions of 28 U.S.C. § 1783 and Rule 17 of the Federal Rules of Criminal Procedure are as follows:

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2 By order of the Court of Appeals entered May 24, 1983, petitioner's motion pursuant to Fed. R. App. P. 41(b) for a stay of mandate pending filing and determination of a petition for a writ of certiorari was granted, provided that the petition be filed by May 31; by order entered May 31, 1983, the stay was continued, provided that the petition be filed by the end of two days after the determination of petitioner's timely petition for rehearing *en banc*, filed on May 12. The petition for rehearing *en banc* was denied by order dated June 7, 1983, and this petition is being filed within two days thereafter.

Title 28, United States Code:

**§ 1783. Subpoena of person in foreign country**

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

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Federal Rules of Criminal Procedure:

**Rule 17. Subpoena**

* * *

(e) PLACE OF SERVICE

* * *

(2) *Abroad.* A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

## STATEMENT OF THE CASE

Petitioner Marc Rich + Co. A.G. ("AG") is a Swiss corporation engaged in international commodities trading, with principal offices in Zug, Switzerland, and branch offices in some 30 countries. It has no office or place of business in the United States. AG has a wholly-owned subsidiary, Marc Rich

+ Co. International Ltd. ("International"), also a Swiss corporation, which has offices in New York and is undisputedly subject to jurisdiction there. (App. B 15a, 17a, 20a.)

In April 1982, AG received a subpoena *duces tecum* issued by a federal grand jury sitting in the Southern District of New York.[3] The subpoena directed AG to produce, among other things, its general ledger, bank records, invoices, bills of lading, contracts, correspondence—in short, all documents in its possession in Switzerland and other foreign countries—relating to crude oil transactions anywhere in the world for the years 1980 and 1981. (App. B 16a.)

**Proceedings and Decision in the District Court**

Pursuant to Fed. R. Crim. P. 17(c), AG moved to quash the subpoena for lack of *in personam* jurisdiction on the grounds that it had no offices or employees in the United States, and did no business in the United States, directly or through its subsidiary. In sum, AG asserted that at or about the time when the subpoena was served, it was not "present" in the United States, a contention accepted by the district court when it later upheld the subpoena on the basis of the New York civil long-arm statute.[4]

No evidentiary hearing was held in connection with AG's motion to quash. The motion was supported by affidavits showing that AG, as a matter of explicit corporate policy, transacts its business outside the United States, and that its

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3 The subpoena was delivered to an attorney representing International (which had previously been served, and was complying, with a similar subpoena); the subpoena was accepted without waiver of AG's objections to the validity of service (App. B 16a).

4 AG also contended that because compliance would require the disclosure of trade secrets and other confidential information concerning AG and third parties with which it trades, AG was barred from producing the subpoenaed documents by Article 273 of the Swiss Penal Code. The district court rejected this contention (App. B 29a), which was not preserved as a separate question on appeal.

wholly-owned subsidiary, International, again as a matter of purposeful corporate structuring, *is* present and *does* do business in the United States, but is neither a "mere department" nor the agent of its parent. (App. B 16a-19a.)

In opposition, the government tendered two theories of jurisdiction. The first, that AG was "present" in the United States, rested on two affidavits of an F.B.I. agent, with documents, referred to in the district court's opinion as "public" because they were served upon AG (App. B 19a-20a). The other (ultimately successful) theory, based on "contacts" with the United States through transactions allegedly conducted on AG's behalf by International, rested mainly on another affidavit by the F.B.I. agent, with an undisclosed quantity of exhibits, submitted to the court *ex parte* (App. B 20a). The court ruled as "a threshold matter" (App. B 21a) (held erroneous by the court of appeals, App. A 10a) that these submissions need only show "a good faith basis for asserting jurisdiction," and that such a showing would shift to AG the burden of disproving jurisdiction (App. B 22a).

The government's "public" evidence was proffered to show that AG was "present," doing business in the jurisdiction, because of sales of oil in 1979 and 1980 by AG to its subsidiary (which took place, on AG's showing, App. B 17a, outside the United States and were at market prices, App. B 24a) and subsequent sales, at large losses, by the subsidiary to third parties.

On the "doing business" theory of jurisdiction, the district court found the subsidiary, International, to be an independent enterprise, not a "mere puppet" or "mere department" of AG (App. B 23a). The court stated that it was "inclined to agree with AG that the public affidavits alone do not establish that the two corporations did not deal at arm's length," and held that "[i]f we were to look only at the public affidavits, we would find a serious question raised as to whether there was a pattern of non-arm's length transactions but we would find it difficult solely on this basis to conclude that an agency relationship existed." (App. B 24a.)

The court then turned to the *ex parte* affidavit, saying its "contents . . . revealed that in sustaining these losses, International directed $20,000,000 of income, which should properly have gone to [International], to AG." (App. B 24a.) Recognizing that "[o]bviously, AG is disabled from showing that a particular non-disclosed transaction did not occur," the court accepted the *in camera* affidavit "because the Government has generally revealed its contents and demonstrated the significance of the secret information, and because the need for secrecy appears to be genuinely invoked." (App. B 25a, 24a.)

Reviewing both the "public" and the secret information, the court said that "[i]f 'doing business' were the only ground for jurisdiction in this case, we would either require a hearing or quash the subpoena . . . ." (App. B 25a, footnote omitted.) The court then dealt with the government's second jurisdictional theory, saying (App. B 26a) that "we naturally turn to the New York long arm statute," applicable in civil suits where jurisdiction is asserted over absent parties.[5] On that ground, the court found the requisite "good faith basis" shown by the government, held that AG had not sustained the shifted burden of proof assigned earlier in the opinion, and denied the motion to quash. The court subsequently entered an order (Appendix C) directing AG to comply with the subpoena.

AG declined to obey the subpoena, and an order (Appendix D) was entered holding it in contempt, imposing a coercive fine of $50,000 per day, and staying the fine pending issuance of the mandate on appeal. The appeal was briefed on an expedited schedule; argument was heard on October 15, 1982, and the court of appeals' decision was handed down on May 4, 1983.

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5 New York Civil Practice Law and Rules § 302, entitled "**Personal jurisdiction by acts of non-domiciliaries,**" which provides, in the section cited (App. B 26a) by the district court: "**(a) Acts which are the basis of jurisdiction.** As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . . ."

**The Decision of the Court of Appeals**

The court of appeals rejected both the rule formulated by the district court shifting the burden of proof on a showing of a "good faith basis" for asserting jurisdiction, and the New York State statutory authority relied on by the lower court in upholding jurisdiction (App. A 10a, 6a). It held, however, that the "ongoing interest in grand jury secrecy" (App. A 12a), not further elaborated, justified the district court's consideration of evidence *in camera*. Based upon its "own review of the affidavits submitted in the district court" (App. A 10a), the court of appeals affirmed the district court's decision on a different, non-statutory, basis.

As to the quantum of proof necessary to support the subpoena, the court of appeals held that the government need show only a "reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction" (App. A 12a). No mention was made of the procedural fact, herein presented for this Court's consideration, that enforcement of the contempt order ends the proceeding without any occasion for the government's "establishing the facts necessary for the exercise of jurisdiction . . . ."

The "reasonable probability" of ultimately proving *in personam* jurisdiction was shown, the court of appeals held, because (1) there had been an alleged conspiracy (though not yet proved or made the subject of indictment) to evade American taxes between AG and International in 1980 (App. A 7a-8a); (2) two directors of both corporations were United States residents (App. A 8a); (3) "such circumstances would be sufficient to warrant judicial enforcement of the grand jury's subpoena" served in 1982 (*id.*); and (4): "There is sufficient likelihood that unlawful tax manipulation was taking place between appellant and its wholly-owned subsidiary to make it reasonable and just, according to our traditional conception of fair play and substantial justice to require appellant to respond to the grand jury's inquiries. *See International Shoe Co.* v. *Washington,* 326 U.S. 310, 320 (1945)." (App. A 12a.)

Invoking the all-writs statute, 28 U.S.C. § 1651, the court rejected petitioner's argument that the extraterritorial reach of United States compulsory process is limited by, among other things, 28 U.S.C. § 1783, which provides for such an extension only in the case of a "national or resident of the United States." Moreover, the court held, it had authority for "fashioning a method of serving process where none was provided by statute" by virtue of Fed. R. Civ. P. 83. (App. A 9a.)

## REASONS FOR GRANTING THE WRIT

The decision of the court of appeals creates an unprecedented rule of long-arm power to sustain service of a federal grand jury subpoena on a corporation created, organized, and existing in a foreign country, and in no way "present" within the United States at or about the time of the purported service of the subpoena. Relying on a "reasonable probability" that, at a time never to come in these proceedings, facts could "ultimately" be proved about transactions dating back to 1980, the court of appeals allowed that putative proof (much of it submitted and examined *in camera*) to serve as a basis for *in personam* jurisdiction *in 1982,* without finding even that the alleged transactions would have constituted "presence" of this foreign corporation when they occurred.

The result is a novel and sweeping extension of the reach of American criminal process, raising fundamental questions as to the federal judicial power and stirring significant concerns with respect to the relationships between this and other nations. While this decision affects a corporation, the long-arm principles announced by the court below—allowing service at some later time for misconduct in, or affecting, the jurisdiction on an earlier occasion—would apply equally and no differently to individuals. The same is true for the allowance of secret evidence to found a contempt order and a fine of $50,000 per day upon the routine and automatic ground of "grand jury secrecy."

This remarkable decision—announced almost seven months after a rushed appeal, and rejecting the basic premises while affirming the order of the district court—is not literally in conflict with cases in other Circuits. It is, however, in essential conflict with the applicable statute (28 U.S.C. § 1783) and Rule (Fed. R. Crim. P. 17(e)). Moreover, it departs so widely from bedrock principles in decisions of this and the lower federal courts as to call for correction and for reaffirmation of those principles. It is a case of compelling importance and potentially devastating significance. It is, in our respectful submission, a meaningful occasion for the exercise of this Court's supervisory authority on certiorari.

## I.

## The Long-Arm Rule Created by the Court of Appeals Is Unsupportable on Principle and Inconsistent with a Governing Federal Statute and Rule

Despite the disclaimer of any need to create "a novel federal long-arm rule" (App. A 8a), the court of appeals has announced a startling new doctrine departing from settled principles limiting federal criminal process. It has upheld service in 1982 upon an alien corporation concededly not found in the United States at the time of service based upon a "reasonable probability" of proof of acts touching the United States in 1980. This is, of course, precisely the long-arm device heretofore known to the law only (i) under statutes, (ii) for civil actions, (iii) as a basis to assert adjudicatory jurisdiction, not compulsory process of any kind.

The district court accomplished that result by reliance upon a *state* long-arm statute. While all agree that that was a mistaken basis for expanding federal (or any) grand jury jurisdiction, the substitute rationale of the court of appeals is, if anything, less supportable. It is not only without statutory basis, but inconsistent with the federal statute and rule limiting the overseas reach of the federal subpoena power. It confuses

substantive law jurisdiction with *in personam* jurisdiction to enforce. It offends against foreign relations law principles already tested with serious friction by other, validly authorized extensions of our federal investigatory power. This extraordinary outreach of *in personam* power is today applied to a foreign corporation summoned by a federal grand jury. If its principles are sound, however, they apply equally to individuals abroad and to state claims, never before suggested, of long-arm grand jury power. The principles are not sound, we submit. but gravely erroneous. The errors are of great and sweeping consequence, calling for correction by this Court.

Before the decision below, it has always seemed clear that a foreign party, not found here, is beyond the reach of grand jury process. The Second Circuit itself affirmed the limitation: "Of course there is no power to compel [a non-resident alien] to come from abroad." *United States* v. *Germann,* 370 F.2d 1019, 1022-23 (2d Cir.), *vacated on other grounds,* 398 U.S. 329 (1967). *See also In re Grand Jury Proceedings,* 532 F.2d 404, 405 (5th Cir.), *cert. denied,* 429 U.S. 940 (1976); *Ings* v. *Ferguson,* 282 F.2d 149, 151 (2d Cir. 1960); *In re Grand Jury Subpoenas Duces Tecum,* 72 F. Supp. 1013, 1019 (S.D.N.Y. 1947).

The absence of any long-arm exception to this rule was made clear in an opinion of Justice Holmes, and has never until now been doubted. In *Strassheim* v. *Daily,* 221 U.S. 280, 285 (1910), marking crisply the difference between substantive law jurisdiction and *in personam* jurisdiction, the Justice wrote:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, *if the state should succeed in getting him within its power.*" (Emphasis added.)[6]

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6 The essential point was reaffirmed with equal brevity in *Ford* v. *United States,* 273 U.S. 593, 607 (1927): "The court had jurisdiction to try the offense charged in the indictment and the defendants were in its jurisdiction because they were actually in its custody."

Of course, the underscored qualification would not exist were there long-arm criminal process. But the court of appeals in this case steadily blurred the distinction between jurisdiction to prescribe applicable rules and jurisdiction to enforce them.[7] *See* App. A 5a-6a, 7a-8a, citing cases that follow the distinction rather than ignoring it—*e.g.*, *Melia* v. *United States*, 667 F.2d 300 (2d Cir. 1981), where extradition was necessary to acquire the *in personam* jurisdiction for Canada's enforcement of its subject matter jurisdiction.[8]

Overriding the settled principles that give rise to complexities like those of extradition, the court below found alleged "contacts" in 1980—or a "reasonable probability" that such contacts could be proved though they never need be—sufficient for *in personam* jurisdiction in 1982. The authorities cited for that are cases sustaining the constitutionality of state long-arm statutes, *e.g.*, *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), not judge-made rules of either civil or criminal process. But if the court below is correct, there is obvious statutory ground, stronger than the judicial authority herein asserted, for state grand jury process to extend at least across the nation. Nobody appears ever to have thought of that. The decision below is at least equally surprising.

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7 *See* Restatement (Second) Foreign Relations Law of the United States § 33(1) (1965).

8 The residence in the United States of two individuals who are directors and executive officers of the subsidiary and also directors of petitioner is without significance for jurisdiction over petitioner. *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 195 (1915). Nor does it add anything to allege that there was a "conspiracy" between petitioner and parties in the United States. *See Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972) ("mere presence of one conspirator . . . does not confer personal jurisdiction over another alleged conspirator"); *see also Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1236-37 (7th Cir.), *cert. denied*, 454 U.S. 893 (1981).

It merits emphasis that the new long-arm doctrine of the Second Circuit is not less applicable to individuals than to corporations. This is true generally, of course, of the principles (where they properly apply) allowing *in personam* jurisdiction over parties charged with wrongful acts at some past time in (or affecting) the jurisdiction. *Simonson* v. *International Bank*, 14 N.Y. 2d 281, 288 (1964). *See also Arrowsmith* v. *United Press International*, 320 F.2d 219, 227-28 (2d Cir. 1963). Thus, a nonresident alien charged with a crime in the jurisdiction, state or federal (even if *never* present there[9]), could be subpoenaed by the grand jury, held in contempt, and made subject to severe penalties without ever being present for service in the heretofore required fashion. (To complete the analogy, the service could be effected upon a putative agent, though the "method of service," contrary to intimations in the decision below, App. A 9a, is of no consequence for present purposes.) That this is unheard of is, in our submission, a measure of the extreme deviation effected by the decision of the court of appeals.

Far from being supportable on statutory grounds, the decision of the court of appeals is in fundamental conflict with a clear, narrowly drawn, tightly controlled federal statute governing the reach of federal subpoena power overseas.

28 U.S.C. § 1783 provides for a subpoena to be served upon someone "who is in a foreign country" only if (in addition to other restrictions) the proposed witness is "a national or resident of the United States . . . ." Fed. R. Crim. P. 17(e)(2) says a subpoena "directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in . . . § 1783." The statute does not authorize the subpoena here in question; on the contrary, read with its history and application, § 1783 is seen to be transgressed by the result below.

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9 It is familiar, as noted earlier, that an offense against a jurisdiction's substantive law may be committed by someone who never enters the jurisdiction. *Strassheim* v. *Daily, supra*, 221 U.S. at 285; *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

From *United States* v. *Thompson,* 319 F.2d 665 (2d Cir. 1963), we learn that prior to enactment of the Walsh Act, now 28 U.S.C. § 1783, subpoenas to compel attendance of witnesses in grand jury proceedings could not reach even American citizens sojourning abroad. As this statute read at the time of *Thompson,*[10] it was held not to authorize *grand jury* subpoenas even though it covered subpoenas for "testimony in a criminal proceeding . . . ." Even such a modest extension was beyond judicial authority; it called upon a power that could only

> "be exercised by Congress, and the district court has no such power or jurisdiction unless expressly conferred by statute." *Id.* at 667.

For citizens who are reachable abroad because they "owe allegiance to the United States," *Blackmer* v. *United States,* 284 U.S. 421, 436 (1932), it took an Act of Congress to add an "explicit provision" for the modest addition of power to force appearances before grand juries, *see* S. Rep. No. 1580, 88th Cong., 2d Sess., 9-10, *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3790-91. But there is no "explicit" or other authority for service upon someone, not a resident or citizen, who at some prior time may have been here and acted in ways giving rise to an effort to have the person's testimony. There is in other words no federal long-arm subpoena jurisdiction.

That this is so works sometimes against defendants claiming the Sixth Amendment right to compulsory process. *See United States* v. *Greco,* 298 F.2d 247, 251 (2d Cir.), *cert. denied,* 369

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10 What is now § 1783 then said in material part:

> **"Subpoena of witness in foreign country**
>
> "(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:
>
> * * *
>
> "(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General."

U.S. 820 (1962); *Gillars* v. *United States*, 182 F.2d 962, 978 (D.C. Cir. 1950); *United States* v. *Haim*, 218 F. Supp. 922, 925-26 (S.D.N.Y. 1963); *United States* v. *Wolfson*, 322 F. Supp. 798, 819 (D.Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972). It may also work, as here, against the exertions of federal prosecutors. *Cf. United States* v. *Mendez-Rodriguez*, 450 F.2d 1, 5 (9th Cir. 1971) (conviction reversed because government returned witnesses to Mexico "placing them beyond the reach of the subpoena power"). In either event, the limitation of the jurisdiction, with the stated narrow exceptions, marks the boundaries as Congress has prescribed them.[11]

In the case at bar, the court of appeals noted that the subpoena was "not served in a foreign country." (App. A 9a.) This, we submit, is immaterial; the subpoena was directed to petitioner, regardless of the manner of its delivery, and petitioner is not within the narrow exception created by 28 U.S.C. § 1783 to the strictly territorial limits of jurisdiction. Service was accepted by a lawyer for petitioner's subsidiary, waiving questions about "method of service" but preserving all other rights, including the basic right to contest *in personam* jurisdiction. Equally clearly, the lack of a jurisdictional basis is not supplied by the court of appeals' references to the all-writs

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11 The limitation is further evidenced in connection with the doctrine of *forum non conveniens*. This Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, 511 (1947), stated that the "availability of compulsory process for attendance of unwilling . . . witnesses" is an "important consideration" in determining whether a forum is convenient for trial since "litigants cannot compel personal attendance" of witnesses in Virginia at a trial in New York State. *See also Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1030-31 (3d Cir. 1980) (witnesses and documents in Norway not subject to United States compulsory process for attendance at civil trial in Delaware). Except for the limited effect of 28 U.S.C. § 1783, inapplicable here and inconsistent with the decision below, no authority exists to extend grand jury process or other criminal process beyond the national boundaries confining compulsory civil process.

statute, 28 U.S.C. § 1651, and to Fed. R. Civ. P. 83 (App. A 9a). The former does not create an independent basis of jurisdiction, but only sanctions issuance of appropriate orders or process once subject matter and personal jurisdiction are established. *See Brittingham* v. *Commissioner,* 451 F.2d 315, 317 (5th Cir. 1971); *Lewis* v. *Reagan,* 516 F. Supp. 548, 554 (D.D.C. 1981). Rule 83 grants authority to regulate practice in the district court, and is self-evidently not a jurisdictional grant

The extraterritorial extension of federal criminal process is a subject uniquely fitted for regulation by Congress and the Executive in legislative enactments rather than judge-made rules.[12] At stake are delicate relations between sovereigns, at best strained from time to time by what are seen as objectionable intrusions. "No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Restatement (Proposed) Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, March 15, 1982), Reporters' Notes, p. 18. The point has not failed on other occasions to be noted by the Second Circuit. *See, e.g., Arrowsmith* v. *United Press International, supra,* 320 F.2d at 226, 228; *United States* v. *Thompson, supra,* 319 F.2d at 667; *In re Arawak Trust Co. (Cayman) Ltd.,* 489 F. Supp. 162, 165 (E.D.N.Y. 1980).

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12 Even as to civil jurisdiction, it would seem that absent a specific authorizing statute, a court cannot exercise *in personam* jurisdiction over a nonresident defendant not found within the jurisdiction at the time of service. *See, e.g., Founding Church of Scientology* v. *Verlag,* 536 F.2d 429, 432 (D.C. Cir. 1976); *Lott* v. *Burning Tree Club, Inc.,* 516 F. Supp. 913, 915 (D.D.C. 1980). *See also* Restatement (Second) Conflict of Laws § 36 and *id.*, comment *g* (1971).

## II.

### It Was Error to Enforce the Subpoena on a "Reasonable Probability," Never to be Tested, that Jurisdictional Facts Could Be Proved

The court of appeals held that all the government need show to support the subpoena is a "reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction . . . ." (App. A 12a.) In justifying that relaxed burden, the court cited a number of inapposite cases dealing, in other contexts, with the broad powers of grand juries. Not only do those cases fail to address the issues raised here; several of them explicitly recognize the physical and territorial problems of acquiring *in personam* jurisdiction over an absent alien. *See, e.g., United States* v. *Pizzarusso,* 388 F.2d 8, 11 (2d Cir. 1968) ("It may be possible that the particular criminal sanctions . . . will never be enforced unless the defendant enters the country"); *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F.2d 147, 154 (D.C. Cir. 1961) ("the question as to whether the order can be enforced by extra-territorial means is not presently before us").

In any event, the "reasonable probability" test of the court below is illusive and meaningless in a contempt proceeding because it extends a promise certain to be broken as a substitute for proof of jurisdiction. Whatever the government's burden may be, on which the two lower courts differed (App. A 10a), it will never be sustained because there will never be a test of it. The contempt proceeding has ended. The final order has issued and a $50,000 per day coercive fine has been imposed on a record that concededly fails to show jurisdiction but is said to show only a hypothetical "probability" that it would be proved somewhere if required—or, of course, would not be proved if the hypothetical prediction is wrong. The result is a departure from fundamental principle so marked and so ridden with misconceptions as to call for this Court's supervisory intervention.

The vital mistake in this case is highlighted by reference to such wholly distinguishable decisions as *Visual Sciences, Inc.* v. *Integrated Communications, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) (cited at App. A 11a), where provisional proof is accepted on some issues because the preliminary "findings are not conclusive, and may be altered after a trial on the merits." *Id.* at 58.[13] Even there, it is regularly held that preliminary proof should not be allowed to support a provisional remedy that "work[s] to give a party essentially the full relief he seeks on the merits." *Dorfmann* v. *Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969). *See also Diversified Mortgage Investors* v. *U.S. Life Title Insurance Co.*, 544 F.2d 571, 576 (2d Cir. 1976); *Dunn* v. *Retail Clerks International Association*, 299 F.2d 873, 874 (6th Cir. 1962); *W.A. Mack, Inc.* v. *General Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958). Here, the government has had all it demanded, including a Draconian fine, without ever being called upon to show that the alleged contemnor is within the court's jurisdiction.

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13 Even where provisional proof is accepted, the party opposing the preliminary relief must be accorded a full and fair opportunity to test the proponent's proof, an opportunity signally lacking here. *See* Point III, *infra*; and see the court of appeals' comment in the *Visual Sciences* case:

> "[I]f the hearing [on a motion for a preliminary injunction] is to serve its intended purpose of illuminating and resolving factual issues, it must be conducted fairly. The opposing party must be afforded the opportunity to cross-examine the moving party's witnesses and to present witnesses."

*Id.* at 58. *See also Briscoe* v. *Kusper*, 435 F.2d 1046, 1057 (7th Cir. 1970).

## III.

## The Use of *In Camera* Evidence Denied Petitioner's Due Process and Confrontation Rights

The acceptance of materials submitted *ex parte* and found decisive for jurisdiction over petitioner—a procedure justified by the court of appeals with a brief reference to "an 'ongoing interest in grand jury secrecy' "—warrants review by this Court because the use of secret evidence strikes at the "root requirements of due process." *In re Taylor,* 567 F.2d 1183, 1188 (2d Cir. 1977). *In camera* proceedings offend against the basic premises of our judicial system. They are especially anomalous in this case, where the court of appeals broadly justified its novel jurisdictional theory on the assertion that petitioner was given "adequate notice and an opportunity to be heard." (App. A 7a.)

The question whether *ex parte* submissions can be received raises fundamental due process issues. "Reliance upon evidence considered *in camera* as the basis for decision is fundamentally inimical to due process." *Briscoe* v. *Kusper,* 435 F.2d 1046, 1057 (7th Cir. 1970). It should be allowed, if at all, only in truly extraordinary situations, presenting compelling circumstances, and then only to the degree really necessary. *E.g., In re Taylor, supra,* 567 F.2d at 1187-88; *In re Grand Jury Proceedings,* 486 F.2d 85, 93 (3d Cir. 1973). The court enforcing grand jury subpoenas does not sit to "rubber stamp" executive judgments or accusations, *id.,* 486 F.2d at 90. "By now it should be apparent that 'grand jury secrecy' is no magical incantation making everything connected with the grand jury's investigation somehow untouchable." *In re September 1971 Grand Jury,* 454 F.2d 580, 583 (7th Cir. 1971), *rev'd on other grounds,* 410 U.S. 19 (1973). The automatic acceptance, sanctioned by the court below, of grand jury secrecy claims as a basis for using secret evidence to sustain jurisdiction and a contempt finding, sacrifices "the enlightenment which accompanies an adversary proceeding." *In re Taylor, supra,* 567 F.2d at 1189.

Moreover, the broad claim of grand jury secrecy is less acceptable when, as here, secret materials do not consist of proceedings before the grand jury. The *ex parte* materials in this case appear to have consisted of simple hearsay and law enforcement conclusions. No "extraordinary circumstances," *In re Grand Jury Proceedings, supra,* 486 F.2d at 93, were shown justifying the *in camera* proceedings. Far from relying upon "extraordinary circumstances" to warrant a departure, the decision below, in a single sentence, declares secret evidence in contempt proceedings a standard and everyday corollary of "grand jury secrecy."[14]

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14 There appears now to be a divergence of opinion on this subject within the Second Circuit, which led to a petition for rehearing *en banc* in the instant case. *See* note 2, *supra*. In another case involving alleged contempt for disobedience to a grand jury subpoena, *In re Frank Kitchen*, Docket No. 83-6083 (April 27, 1983), another Second Circuit panel said that "the right to confrontation ordinarily includes the right to examine all documents considered by the court in reaching a decision." Slip op. at 3477. The court held, reversing the civil contempt adjudication of Kitchen, a grand jury witness, that in the contempt proceedings "the right to confront all the government's evidence, both documentary and testimonial," should be protected "unless particular and compelling reasons peculiar to the grand jury function require some curtailment of [that] right." *Id.* at 3476. That left it clear, of course, that denial of the right of confrontation could not be a routine incident of grand jury contempt proceedings, but only an exceptional departure commanded by "particular and compelling reasons . . . ." For secrecy, like "urgency," is a consideration "inherent in any grand jury investigation" and neither should be "enough to justify eliminating a witness's basic right to a fair hearing . . . ." *Id.* at 3475. The panel in the instant case made no reference to "particular and compelling reasons" for the *in camera* procedure, and none had been presented by government counsel beyond the broad, uniformly available reference to grand jury secrecy.

## CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 9, 1983

## APPENDIX A

**Decision of the United States Court of Appeals for the Second Circuit**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 501—August Term, 1982

(Argued October 15, 1982 Decided May 4, 1983)

Docket No. 82-6226

IN THE MATTER OF A GRAND JURY SUBPOENA
DIRECTED TO MARC RICH & CO., A.G.

MARC RICH & CO., A.G., A Swiss Corporation,

*Appellant,*

—v.—

UNITED STATES OF AMERICA,

*Appellee.*

Before:

VAN GRAAFEILAND and PIERCE, *Circuit Judges,*
and WYATT, *District Judge**

* Of the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (Sand, J.) holding appellant in contempt for failure to comply with a grand jury subpoena duces tecum and imposing sanctions to compel compliance. Affirmed.

MARVIN E. FRANKEL, New York, N.Y., (Proskauer Rose Goetz & Mendelsohn, and John W. Ritchie and Robert C. Finkel, New York, N.Y., of counsel), *for Appellant.*

MORRIS WEINBERG, JR., Ass't U.S. Attorney, S.D.N.Y. (John S. Martin, Jr., U.S. Attorney, and Gerard E. Lynch, Ass't U.S. Attorney, S.D.N.Y., of counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

Marc Rich & Co., A.G. appeals from an order of the United States District Court for the Southern District of New York (Sand, J.), which held it in civil contempt for failing to comply with the court's order directing it to produce certain records pursuant to a grand jury subpoena duces tecum and which imposed a coercive fine to take effect upon the disposition of this expedited appeal. We affirm.

Appellant is a Swiss commodities trading corporation dealing in the international market in bulk raw materials such as petroleum, metals, and minerals. Its principal office is in Zug, Switzerland. Although it has forty branch offices in thirty countries around the world, it has no office in the United States. However, Marc Rich & Co. International Limited (International), a wholly-owned subsidiary of appellant, does business in the State of New York. The same five persons serve

as the directors of the two companies. Three board members are Swiss residents, and two, Marc Rich and Pincus Green, reside in the United States and are employed by International as traders.

In March, 1982, a federal grand jury in the Southern District of New York was investigating an alleged tax evasion scheme, involving appellant, International, and the principals of each company, whereby, during 1980, International diverted a minimum of $20 million of its taxable income to appellant. On March 9, 1982, a grand jury subpoena duces tecum was served on International for the production of business records relating to crude oil transactions during 1980 and 1981. International complied with the subpoena. On April 15, 1982, a grand jury subpoena duces tecum, addressed to appellant and served on International, called for production by appellant of similar records.

On June 9, 1982, appellant moved to quash the subpoena on the grounds that appellant was not subject to the in personam jurisdiction of the court and that Swiss law prohibited the production of the materials demanded. In an opinion dated August 25, 1982, Judge Sand denied the motion to quash, finding that personal jurisdiction existed and that the operation of Swiss law was no bar to the production of the documents. When appellant persisted in its refusal, Judge Sand adjudged it to be in civil contempt. Appellant's arguments on appeal center principally on the issue of jurisdiction.

## DISCUSSION

Because the grand jury is a centuries-old, common law institution, adopted without definition by the framers of our Constitution, its historical purposes and functions have been explored at length by judges and legal scholars. *See* Wright, *Federal Practice and Procedure: Criminal 2d* § 101 (1982). All are agreed that a grand jury has both the right and the duty to inquire into the existence of possible criminal conduct, *Branzburg v. Hayes,* 408 U.S. 665, 688 (1972), and "[i]ndispensable to the exercise of its power is the authority . . . to require the

production of evidence," *United States v. Mandujano,* 425 U.S. 564, 571 (1976). "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed . . . ." *United States v. Stone,* 429 F.2d 138, 140 (2d Cir. 1970). The jury's "investigative power must be broad if its public responsibility is adequately to be discharged." *United States v. Calandra,* 414 U.S. 338, 344 (1974). Since the mere possibility that violations of federal law have occurred is sufficient authority for a grand jury to act, *United States v. Sisack,* 527 F.2d 917, 920 (9th Cir. 1976), its investigation in the instant case cannot be faulted.

Congress has made clear its intent that this nation's income tax laws are applicable to foreign corporations. *See, e.g.,* 26 U.S.C. §§ 881-884; Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶¶ 17.01-17.43 (3d ed. 1971). Under well-settled rules of international law, the authority of Congress to impose punishment for violation of these laws is equally clear. Of the five generally recognized principles of international criminal jurisdiction—territorial, nationality, protective, universality, and passive personality—*Introductory Comment* to *Research on International Law, Part II, Draft Convention on Jurisdiction with Respect to Crime,* 29 Am. J. Int'l Law 435, 445 (Supp. 1935), the territorial and protective principles justify the enforcement of penal revenue statutes such as 26 U.S.C. §§ 7201 and 7206. The territorial principle is applicable when acts outside a jurisdiction are intended to produce and do produce detrimental effects within it. *United States v. Pizzarusso,* 388 F.2d 8, 10 (2d Cir.), *cert. denied,* 392 U.S. 936 (1968). Under the protective principle, a state "has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens . . . the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." *Id.* (quoting Restatement (Second) of Foreign Relations Law § 33 (1965)).

Where, as here, the territorial principle is applicable, the Government may punish a defendant in the same manner as if

it were present in the jurisdiction when the detrimental effects occurred. "The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries." *Ford v. United States,* 273 U.S. 593, 623 (1927) (quoting 2 *Moore's International Law Digest* § 202, at 244 (1906)).

> [I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

*The S.S. Lotus,* 1927 P.C.I.J., ser. A, No. 10, at 23, *reprinted in* 2 Hudson, *World Court Reports* 23, 38 (1935). *See also Melia v. United States,* 667 F.2d 300, 303-04 (2d Cir. 1981) (quoting *Strassheim v. Daily,* 221 U.S. 280, 285 (1911)); *United States v. Aluminum Co. of America,* 148 F.2d 416, 443 (2d Cir. 1945). This rule is most clearly applicable where the offense involved a conspiracy and at least one overt act of the conspiracy occurred within the United States. *Melia v. United States, supra,* 667 F.2d at 304; *United States v. Perez-Herrera,* 610 F.2d 289, 290-91 (5th Cir. 1980).

It would be strange, indeed, if the United States could punish a foreign corporation for violating its criminal laws upon a theory that the corporation was constructively present in the country at the time the violation occurred, *see Hyde v. United States,* 225 U.S. 347, 362 (1912), but a federal grand jury could not investigate to ascertain the probability that a crime had taken place. *See Montship Lines, Ltd. v. Federal Maritime Board,* 295 F.2d 147, 154 (D.C. Cir. 1961). The grand jury is an appendage or agency of the court. *Brown v. United States,* 359 U.S. 41, 49 (1959); *United States v. Stevens,* 510 F.2d 1101, 1106 (5th Cir. 1975). It may investigate any crime

that is within the jurisdiction of the court. 1 Orfield, *Criminal Procedure Under the Federal Rules* § 6:39, at 403 (1966). Its duty to inquire cannot be limited to conduct occurring in the district in which it sits. *United States v. Antill*, 601 F.2d 1049, 1050-51 (9th Cir. 1979); *United States v. Girgenti*, 197 F.2d 218, 219 (3d Cir. 1952); *see Masinia v. United States*, 296 F.2d 871, 875 (8th Cir. 1961); *United States v. Neff*, 212 F.2d 297, 301-02 (3d Cir. 1954).

In performing its duty of inquiry, the grand jury must have the right to summon witnesses and to require the production of documentary evidence. "[T]he grand jury's authority to subpoena witnesses is not only historic, . . . but essential to its task." *Branzburg v. Hayes, supra*, 408 U.S. at 688. So long as the court which must enforce the grand jury process can obtain personal jurisdiction of the summoned witness, the witness may not resist the summons on the sole ground that he is a non-resident alien. *United States v. Field*, 532 F.2d 404, 407-10 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *United States v. Germann*, 370 F.2d 1019, 1022-23 (2d Cir.), *vacated on other grounds*, 389 U.S. 329 (1967). Neither may the witness resist the production of documents on the ground that the documents are located abroad. *United States v. First National City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *Federal Maritime Commission v. DeSmedt*, 366 F.2d 464, 468-69 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966). The test for the production of documents is control, not location. *In re Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947).

The question, then, in the instant case is whether the district court had such personal jurisdiction over appellant that it could enforce obedience to the grand jury subpoena. We agree with counsel for both sides that Judge Sand should not have looked to New York State's long-arm statutes in answering this question. *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975); 18A *Fletcher Cyc. Corp.* § 8798, at 315 (1977). The subject of the grand jury's investigation is the possible violation of federal revenue statutes, and its right to inquire of appellant depends upon appellant's contacts with the entire United States, not simply the state of New York.

*Cryomedics, Inc. v. Spembly, Ltd., supra*, 397 F. Supp. at 290. Nonetheless, we are satisfied that the district judge arrived at the correct result.

With *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) as our lodestar, we have subscribed to the "modern notion" that where a person has sufficiently caused adverse consequences within a state, he may be subjected to its judicial jurisdiction so long as he is given adequate notice and an opportunity to be heard. *See Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972). Section 50 of the American Law Institute's Restatement (Second) of Conflict of Laws (1971), similarly provides:

> A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable.

While this principle must be applied with caution in matters which have international complications, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), we think it clearly applicable in the instant case. That the United States is injuriously affected by the wrongful evasion of its revenue laws is beyond dispute. Under such circumstances, it well may be that the occurrence of the offense itself is sufficient to support a claim of jurisdiction, provided adequate notice and an opportunity to be heard has been given. *See* Comment, *Criminal Jurisdiction Over Foreign Corporations: The Application of a Minimum Contacts Theory*, 17 San Diego L. Rev. 429, 448 (1980); Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5, 12 (1964). However, appellant's contacts with the United States were not limited to appellant's alleged extraterritorial violation of United States revenue laws.

If appellant did violate the United States tax laws, a question whose answer must await the possible return of an indictment, that violation occurred in cooperation with appellant's wholly-

owned subsidiary, Marc Rich & Co. International, Ltd., which is authorized to do business in New York State and does so. Moreover, two of the five members of appellant's board of directors, who are also on the board of Marc Rich & Co. International, are residents of the United States. At least one of these directors is alleged to have been directly involved in the scheme to divert the taxable income of International. If, in fact, there was a conspiracy among all of these parties to evade the tax laws, both the conspiracy and at least some of the conspiratorial acts occurred in the United States. *See Melia v. United States, supra*, 667 F.2d at 303-04. Under such circumstances, service of a subpoena upon appellant's officers within the territorial boundaries of the United States would be sufficient to warrant judicial enforcement of the grand jury's subpoena.[1] *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1324 (D.C. Cir. 1980); *In re Electric & Musical Industries, Ltd.*, 155 F. Supp. 892 (S.D.N.Y.), *appeal dismissed*, 249 F.2d 308 (2d Cir. 1957); *In re Canadian Int'l Paper Co., supra*, 72 F. Supp. at 1019-20; Fed. R. Civ. P. 4(d)(3) & 17(e)(1).

We find no merit in appellant's argument that ratification of the service upon it of the subpoena would be tantamount to creating a novel federal long-arm rule without congressional authorization. That argument, as we understand it, proceeds as follows:

1. Fed. R. Crim. P. 17(e)(2) provides that a "subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783."

2. Section 1783 provides for service upon a "national or resident of the United States who is in a foreign country" for the "production of a specified document or other thing by him."

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1 The subpoena was accepted by International's attorney, and the manner of service, as distinguished from jurisdiction, is not challenged.

3. Since section 1783 is silent concerning foreign corporations which are not nationals or residents of the United States, those corporations are not subject to subpoena, regardless of the place and manner of service.

In making this contention, appellant ignores the fact that the subpoena in the instant case was not served in a foreign country and that, ever since the enactment of the first all-writs statute as part of the Judiciary Act of 1789, 1 Stat. 73, 81-82, judicial authority to issue subpoenas has had congressional approval. From almost the birth of our nation, Congress has recognized that the "right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law." *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911) (quoting *Amey v. Long*, 9 East 473, 484, 103 Eng. Rep. 653, 658 (1808)). *See also Harris v. Nelson*, 394 U.S. 286, 299-300 (1969); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613-616 (1929). Indeed, this Court has found it unnecessary to look to the all-writs statute, now 28 U.S.C. § 1651, in fashioning a method of serving process where none was specifically provided by statute. In *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 108 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966), we relied upon Fed. R. Civ. P. 83 which provides in part that "[i]n all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Briefly summarized, appellant's argument puts the cart before the horse. A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction. *United States v. Germann, supra*, 370 F.2d at 1022-23; *In re Shipping Industry*, 186 F. Supp. 298, 317-18 (D.D.C. 1960).

The crucial issue on this appeal is how much of a jurisdictional showing the Government had to make in order to warrant the issuance of the subpoena directed to appellant. Appellant contends that the district court committed reversible error in holding that, although the Government had to show in

the first instance that it had a good faith basis for asserting jurisdiction, once it did so, the burden of proving lack of jurisdiction shifted to appellant. We agree with appellant's argument concerning burden of proof but disagree with appellant's contention that reversal is required. Based upon our own review of the affidavits submitted in the district court, *see Diversified Mortgage Investors v. U.S. Life Title Ins. Co.*, 544 F.2d 571, 577 (2d Cir. 1976), we are satisfied that the Government made a sufficient showing of personal jurisdiction to justify the district court's order.[2]

In the seminal case of *Blair v. United States*, 250 U.S. 273 (1919), Justice Pitney, writing for the Court, said that grand jury witnesses "are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." *Id.* at 282. He continued, "At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Id.* at 282-83.

Although Justice Pitney was discussing subject matter rather than personal jurisidction, the same reasoning may be applied in cases such as the instant one, where the appellant is not challenging enforcement of the grand jury subpoena on the due process grounds of notice and an opportunity to be heard, *see Blackmer v. United States*, 284 U.S. 421, 440 (1932). Requiring the Government to prove by a preponderance of evidence the facts upon which it bases its claim of personal jurisdiction "might well invert the grand jury function, requiring that body to furnish answers to its questions before it could ask them." *In re Harrisburg Grand Jury 79-1*, 658 F.2d 211, 214 (3d Cir. 1981). "[A] sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received." *United States v. Dionisio*, 410 U.S. 1, 15-16 (1973); *see United States v. Bisceglia*, 420 U.S. 141, 150 (1975); *Associated Container Transportation (Austra-*

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2 At oral argument to the district court, both sides disclaimed need for an evidentiary hearing.

*lia) Ltd. v. United States*, Nos. 82-6242, -6314, -6316, slip. op. at 2942 (2d Cir. April 8, 1983).

As already pointed out, a grand jury is not limited in its investigation to criminal acts occurring in the district in which it sits. In *United States v. Girgenti, supra*, 197 F.2d 218, the witness challenged the right of a grand jury sitting in the Eastern District of Pennsylvania to summon and examine him concerning events which took place in New Jersey. In dismissing this contention, the court said:

> There is not the slightest doubt that if people conspire in New Jersey to . . . conceal tax liability . . . in the Eastern District of Pennsylvania, the grand jury in the latter district may inquire into it. To appellant's argument that this grand jury had not found anything about affairs in New Jersey that affected matters in the Eastern District of Pennsylvania, we answer that the grand jury had not then and has not now completed its investigation. What it will eventually find, no one, not even appellant's counsel, knows.

*Id.* at 219.

Attendance and response to a subpoena is a public duty, a duty "not to be grudged or evaded." *Hurtado v. United States*, 410 U.S. 578, 589 n.10 (1973)(quoting 8 Wigmore, *Evidence* § 2192, at 72 (McNaughton rev. 1961)). "Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities and become a hermit." *Id.* When the defendant in a civil case challenges the grant of a temporary injunction on the ground that the court is without personal jurisdiction, the plaintiff is required to establish only a reasonable probability of ultimate success on this issue. *Visual Sciences, Inc. v. Integrated Communications, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981). The remedy for violation of the district court's order in such a case ordinarily is the same as here, *i.e.*, civil contempt. *Shillitani v. United States*, 384 U.S. 364, 368 (1966). "A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered;

and it remains at all times under the control and supervision of a court." *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973). In view of the civilized world's abiding concern for the disclosure of truth and the proper administration of justice, *see United States v. Bryan*, 339 U.S. 323, 331 (1950), we conclude that, in a case such as this, if the Government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction, compliance with the grand jury's subpoena may be directed.

Such a showing has been made in the instant case. For example, affidavits submitted by the Government disclose that, in 1980, approximately 40% of International's crude oil purchases, worth $345 million, were from appellant. International then realized a gross loss of over $110 million in selling to its domestic customers. There is sufficient likelihood that unlawful tax manipulation was taking place between appellant and its wholly-owned subsidiary to make it "reasonable and just, according to our traditional conception of fair play and substantial justice" to require appellant to respond to the grand jury's inquiries. *See International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

Appellant's remaining contentions require no extended discussion. Although in camera submissions of affidavits are not to be routinely accepted, an exception to this general rule may be made where an "ongoing interest in grand jury secrecy" is at stake. *In re John Doe Corp.*, 675 F.2d 482, 489-91 (2d Cir. 1982). The imposition of a coercive fine was not improper, *In re Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 550-51 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976), and will be reversed only for abuse of discretion, *United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980). In view of appellant's conceded size and the total monetary value of the transactions taking place between appellant and its wholly-owned subsidiary, the coercive fine of $50,000 per day did not constitute an abuse of the district court's discretion. Appellant may avoid any liability by promptly complying with the subpoena. We will direct that the mandate issue one week from the date of

this opinion in order to permit appellant to make the necessary arrangements for compliance.

Affirmed.

I concur.

L. W. PIERCE
5/3/83

I concur.

I.B.W.

## APPENDIX B

**Decision of the United States District Court for the Southern District of New York**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-11-188

In the Matter of a Grand Jury
Subpoena Directed to

MARC RICH & CO. A.G., A Swiss Corporation

OPINION

*THIS OPINION IS TO BE SEALED.*

SAND, J.

On this motion to quash a grand jury subpoena, we are called upon to determine the reach of this Court's jurisdiction over a Swiss corporation, Marc Rich & Co., A.G. ("AG").

AG claims that it has deliberately structured its business to avoid any contact with the United States and is not subject to this Court's jurisdiction. The Government asserts that certain activities of AG's wholly owned subsidiary, Marc Rich & Co., International Ltd. ("International"), provide a sufficient basis for the assertion of jurisdiction over AG. AG contends that since there is neither an agency nor a "puppet-puppeteer" relationship between the two companies, the acts of the subsidiary cannot be attributed to the parent for jurisdictional purposes.

AG submits the affidavits of Alexander R. Hackel, chief executive officer of AG ("Hackel Affidavit"), and Peter F. Ryan, chief financial officer of International ("Ryan Affidavit"), to show that International exists as a substantial, independent organization and that all of the dealings between the companies have been at arm's length.

The Government maintains that its investigation has revealed that on at least twenty occasions in the year 1980, International has engaged in transactions for the benefit of AG, incurring over $110 million in losses on AG's behalf. Affidavit of Gerard J. Lang, Special Agent with the Federal Bureau of Investigation dated July, 1982 [sic] at ¶¶ 4-6 ("Lang Affidavit"). The government has furnished the Court with details of this investigation in an *ex parte* affidavit of Special Agent Lang ("*Ex Parte* Affidavit").

AG also argues that Swiss penal law bars the disclosure demanded by the grand jury.

## I

## *BACKGROUND*

### A. *The Subpoena*

On April 15, 1982, a subpoena duces tecum for the production of AG's documents concerning crude oil transactions in 1980 and 1981 was served on Edward Bennet Williams, counsel for International. Williams accepted service to avoid the need to serve an officer of International but did not purport to accept service for AG. Hackel Affidavit at ¶ 4. The Government seeks these documents as part of a grand jury investigation of AG and International, as well as an investigation of their principal officers and directors, for alleged criminal violations of United States tax law.

AG's board of directors, after determining that compliance with the subpoena would violate Swiss law forbidding disclosure of a "business secret" to a "foreign government authority" (Swiss Penal Code, Art. 273), resolved not to comply with the subpoena and to seek to establish its ineffectiveness in the American courts.

B. *AG's Version*

AG's picture of the parent and subsidiary, detailed below, focuses on the formal separateness of the two companies. AG is in the business of international commodities trading. It purchases large quantities of raw materials, chiefly petroleum, and attempts to resell them at a profit within a very short time from the purchase. It avoids taking the materials into inventory by usually taking title to the commodities after they are on board ship and passing title to the purchaser either while the ship is still in the loading port or while the ship is at sea. *Id.* at ¶ 10. Nearly all of AG sales are to buyers in countries other than that of the producer, owing to the fact that "most countries which are large scale producers of the raw materials in which AG deals seldom have an industrial infrastructure consuming those materials." *Id.* at ¶ 10. Within the United States, however, there exists a market for both the large scale purchase and the large scale sale of these materials. *Id.* at ¶ 9. This uniqueness of the United States led AG to set up International. *Id.* at ¶ 9 & 21-23. AG is governed by a board of directors, which includes Marc Rich and Pincus Green, who reside in the United States and also work as traders and serve as directors for International. *Id.* at ¶ 15. AG employs traders and a support staff consisting of credit, financial and accounting personnel. *Id.* at ¶¶ 16-17. AG's financing arrangements include some lines of credit which it shares with International. *Id.* at ¶ 18. AG maintains more than 40 offices in 30 countries, which employ their own traders and support staffs, and which (with one exception) are empowered to bind AG. *Id.* at ¶ 19. It does no business in the United States, nor is it authorized to do so. *Id.* at 1. Transactions which involve the United States, such as those with International, described below, are purposely structured so that title passes offshore. *Id.* at ¶ 26.

International is tailored to the special conditions of the United States market. AG did not merely set up another branch office to trade in this market both because of these conditions and because "[t]he commodities business outside the United States involves dealings with governmental monop-

olies and cartels and may include business practices from which United States companies are disabled." *Id.* at ¶ 22. One difference between the two companies is that International takes some of its commodities into inventory, and subsequently distributes these materials in smaller lots. *Id.* at ¶ 14. To this end, it rents storage space throughout the country and incurs risk of loss for longer periods of time than does AG. Like AG, it trades large quantities of raw materials, but "[i]t concentrates on business either wholly domestic to the United States or having a United States component. . . ." Ryan Affidavit at ¶ 5. It has principal offices both in New York City and in Zug, but "[i]ts business operations are directed by senior management in the New York office." Ryan Affidavit at ¶ 6. This senior management includes Marc Rich, as chairman, and Pincus Green, as president. *Id.* All of AG's directors are also directors of International, but "International operates as an independent entity which pursues its own business without control by AG, and does not represent or otherwise act for AG." *Id.* at ¶ 4. International employs nearly 160 persons in the United States including 50 traders, 12 "traffic" persons, and 35 finance, credit and accounting persons. *Id.* at ¶ 7-8. These employees use their own financial expertise and knowledge of the commodities markets in conducting International's business, without reliance on AG. *Id.* at ¶ 7-9. International maintains separate books and records. *Id.* at ¶ 9. International also employs 11 traders and a support staff in Zug. *Id.* at ¶ 10. This office handles transactions involving countries other than the United States, including those between AG and International. *Id.* International pays United States taxes on its United States income. *Id.* at 11. International "maintains relationships with about 50 banks throughout the world, however, most of its credit is in the form of a credit line extended to both it and AG and guaranteed by AG." *Id.* at 12. Although International could now acquire credit in its own right, it chooses to continue using this shared credit in order to receive "the best possible terms." *Id.* at ¶ 13.

Trades between parent and subsidiary result from the chance confluence of the business needs of the two companies. For

example, if AG is in possession of a commodity "which International needs for one of its own customers" and "[if] for some reason AG's intended sale has not materialized or if it can cover the intended sale with another lot of material, International may purchase that commodity from AG for resale to International's customer. *Id.* at ¶ 17. Prior to 1981, at some times, these roles may be reversed, and International would sell to AG. *Id.* at ¶ 18. These transactions formed approximately 12% of International's total sales and 7% of its purchases in 1981. *Id.* at 19. (It should, however, be borne in mind, as the Government points out, that International's annual sales exceed $1-1/2 billion.) International also uses some of AG's facilities, paying for this use on a pro-rata basis at the end of the year. *Id.* at 20. In addition, AG employees sometimes consult International employees, taking advantage of the latter's expertise, and vice versa. *Id.* at 20-21. This information is then used in AG or International's own business, independent of any direction or control by the other.

AG and International adhere to a policy of independence. All transactions are conducted at arm's length, pursuant to independent business objectives. Hackel Affidavit at ¶ 25. They are "recorded in appropriate detail in the books of both AG and International." *Id.* at ¶ 29. On occasion, AG acted as International's representative and received a commission in making a sale outside of the United States. *Id.* But International never acts as AG's agent in the United States. *Id.*

C. *The Government's Version.*

The Government attempts to show that this picture of formal separateness masks a scheme of deliberate tax evasion in which International regularly directed income to AG. Special F.B.I. agent Gerard J. Lang states that his investigation into the trading of crude oil between the two companies, International's corporate records, and his interviews with witnesses (named in the *Ex Parte* Affidavit) contradict the assertions of Messrs. Hackel and Ryan. Lang Affidavit at ¶ 3. The Government's view is as follows:

In 1980, AG sold over $345 million worth of crude oil to International. International's general ledger reveals over twenty sales contracts between AG and international, in half of which transfer of title took place in the United States. *Id.* at ¶ 5 (copies of some of the invoices to AG are attached as exhibits). International's records show that it sustained a $110 million loss in the resale of the oil it purchased from AG. *Id.* at ¶ 6. "[I]n all but one case [International] sold the oil purchased from AG at far below the purchase price from AG." *Id.* These 1980 transactions represented approximately 25% of International's total purchases and over 40% of its crude oil purchases. *Id.* at ¶ 7 (The 7% figure noted above at p. 6, while itself substantial in terms of dollars, relates to the year 1981).

The contents of the *ex parte* affidavit were revealed to some extent by counsel for the Government at oral argument and in the Lang affidavit and can thus be generally summarized here. See transcript of July 6, 1982 at 15-16; Lang Affidavit at ¶¶ 5-6. While the affidavit served on AG only shows that International sustained a loss, the *ex parte* affidavit shows that it structured its resales to direct $20,000,000 domestic income offshore to AG, a device which would avoid United States taxes. The Government has submitted the affidavit detailing this assertion *ex parte* to avoid revealing the name of a witness who is cooperating with the Government, a revelation which would jeopardize the grand jury investigation.

## II

## *DISCUSSION*

There is no question that International is subject to the Court's jurisdiction by reason of its "doing business" in this state. The question is whether some of its acts may be attributed to AG and whether those acts provide a sufficient basis for jurisdiction over AG. Both parties agree that in answering this question, the Court must look generally to standards of jurisdiction in civil cases. However, the civil model of jurisdiction provides an imperfect analogy, since the question before

us is the validity of a grand jury subpoena, a proceeding which has unique attributes. Therefore, we must bear in mind the special context in which this controversy arises and the differences between the circumstances here and those faced in the cases cited by the parties.

A. *Burden of Proof*

As a threshold matter, we must establish which party has the burden of proof. Generally, in a civil case, the burden is on the plaintiff, as the party "asserting jurisdiction," to ultimately prove jurisdiction. *Lehigh Valley Industries, Inc.* v. *Birenbaum,* 527 F.2d 87, 92 (2d Cir. 1975). But at noted *supra,* the differences between this proceeding and civil cases must not be overlooked. For example, the Government here, unlike a plaintiff in a civil action, may invoke the general rule that a "presumption of regularity" attaches to grand jury proceedings. *See, e.g., In re Grand Jury Proceedings,* 632 F.2d 1033, 1041 (3d Cir. 1980); *Universal Manufacturing Company* v. *United States,* 508 F.2d 684, 685 (8th Cir. 1975).

A more compelling reason why the civil model must be distinguished is that in a civil case the plaintiff need only make a prima facie showing of jurisdiction to avoid dismissal. Courts will then permit discovery on the issue of jurisdiction, which gives the plaintiff a fair opportunity to meet the burden imposed upon it. *See, e.g., Lehigh Valley Industries, Inc.* v. *Birenbaum,* 527 F.2d 87, 93-94 (2d Cir. 1975); *Saraceno* v. *Johnson & Sons, Inc.,* 83 F.R.D. 65, 71 (S.D.N.Y. 1979). Application of this standard in the context of this motion would be problematic. Ordering discovery to permit the Government to substantiate its assertions would force the very production of documents that AG opposes. AG argues, however, that the Government has already had the opporunity to discover jurisdictional facts, in that it has had the grand jury at its disposal. But since the substance of this motion is AG's refusal to respond to the grand jury, AG cannot rely on the grand jury's ability to obtain discovery on its own. It is, moreover, particularly important for the Government to reach documents in AG's possession if it is to bear the burden of

proof. The agency relationship which is the key to the Government's theory of jurisdiction contradicts the formal picture of corporate separateness which AG reveals to the world. If AG and International are in fact engaged in a tax evasion scheme as alleged by the Government, evidence of their clandestine acts would be likely to be in their possession.

Thus, it appears appropriate that a prima facie showing by the Government that jurisdiction is present here should be a sufficient prerequisite to the requirement that AG produce the requested documents. Although it is true that the subpoena was not designed to seek jurisdictional facts, the Government bases its theory of jurisdiction on the relationship between the two companies, which relationship is central to the alleged criminal scheme attributed to the two companies. Hence, the subpoena would function in the same way as discovery on the jurisdictional issue in a civil case.

Under the circumstances of this motion, we find that the appropriate allocation of the burden of proof is as follows: once the moving party raises the issue of jurisdiction, the Government must show that it had a good faith basis for asserting jurisdiction; thereafter, the burden of proof shifts to the party challenging jurisdiction.

B. *Jurisdiction*

The Government argues that there are two bases for jurisdiction over AG: 1. AG is "doing business" in New York through the actions of its subsidiary International, and 2. some of the specific acts which the grand jury is investigating took place in New York, and thus AG has, again through International, "transacted business" in this jurisdiction. AG argues that only "doing business" jurisdiction can support the enforcement of a grand jury subpoena and that even if the Government's allegations are true, the contacts with New York do not constitute doing business.

1. *"Doing Business"*

Under New York law, which we are constrained to apply, *Arrowsmith* v. *United Press International,* 320 F.2d 219 (2d

Cir. 1963), a corporation is "present" in this state and hence subject to the court's jurisdiction if it does business "not occasionally, or casually, but with a fair measure of permanence and continuity." *Tanza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917). See N.Y.Civ.Prac. Law § 301 (preserving common law bases of jurisdiction). Although mere ownership of a subsidiary that does business in New York does not automatically confer jurisdiction, a corporation may be deemed "present" through the activities of its subsidiary in either of two ways: 1. if the subsidiary is in reality merely a department or a puppet of the parent, or, 2. if the subsidiary has acted as the agent of the parent. *Saraceno* v. *S. C. Johnson & Son, Inc.*, 83 F.R.D. 65, 69 (S.D.N.Y. 1979). In the latter instance, only those acts undertaken on behalf of the parent "may properly be factored into the doing business equation." McLaughlin, Practice Commentaries, N.Y.Civ.Prac. Law C301:3(2) (McKinney 1972).

The Government does not appear to contend that International is the mere puppet of AG. The Government does not attempt to show that International has no independent existence or that all of its business is done at the behest of AG. AG's affidavits show that International regularly engages in trade in its own right, using its own employees and facilities, and is thus more than a mere department of AG.

Rather, the Government has concentrated on numerous instances in which International allegedly acted as AG's agent. As indicated above, for the Court to find that AG "does business" in New York by reason of these actions, these actions alone must meet the "doing business" standard of permanence and continuity. AG's attack on this application of the agency theory is twofold. First, it argues that the Government's public affidavits do not show any jurisdictional contact by AG and that the *ex parte* affidavit cannot be used to supplement that showing. And second, it argues that since the Government's showing is limited to actions that took place in 1980, the Government has failed to show that AG is currently "present" and amenable to process. We will deal with these two arguments in sequence.

The Court is inclined to agree with AG that the public affidavits alone do not establish that the two corporations did not deal at arm's length. These affidavits show that International purchased large quantities of oil from AG at what appears to have been the market price and that subsequently, in reselling that oil, International sustained $110 million in losses. The Government urges the Court to infer that AG must somehow have ultimately benefitted from International's unexplained willingness to sustain massive losses. If we were to look only at the public affidavits, we would find a serious question raised as to whether there was a pattern of non-arm's length transactions but we would find it difficult solely on this basis to conclude that an agency relationship existed.

We turn then to the question of the *ex parte* affidavit. Much of AG's protest as to the unfairness of using an *ex parte* affidavit is offset by the fact that the Government has revealed to a great extent the contents of the affidavit both at oral argument and in its public papers. The Government has revealed that in sustaining these losses, International directed $20,000,000 of income, which should properly have gone to it, to AG. AG has thus had some opportunity to refute these allegations. The Government alleges that it cannot identify the other party to these transactions without disclosing the name of an informant and therby jeopardize the grand jury investigation.

The Court is thus placed in the position of having to balance the Government's need to maintain in secret the identity of the informant and the movant's need to know the asserted grounds for jurisdiction in order to refute them. AG's need for the information is heightened since the Court has imposed the burden of proof on it. Under the circumstances presented in this case, we will consider the *ex parte* affidavit, because the Government has generally revealed its contents and demonstrated the significance of the secret information, and because the need for secrecy appears to be genuinely invoked. In order to mitigate the possible unfairness to the AG, we will only hold AG to a burden of proof which addresses the general disclosure made to AG.

Thus, since AG knows that the Government claims to be able to show that the losses sustained by International actually represented income funnelled to AG, AG must at least show some reason for those losses other than the one asserted by the Government. Obviously, AG is disabled from showing that a particular non-disclosed transaction did not occur, and we have taken that disability into account. We find it telling, however, that AG has never attempted to explain International's losses, other than to advert to the "volatility" of the market, whereas the Government has described and documented a scheme that makes economic sense and appeals to reason. The Government has therefore made its good faith showing of certain jurisidictional facts and AG has not rebutted them.

It remains to be decided whether these jurisdictional facts are sufficient to constitute "doing business." In this regard, we must consider the objection raised by AG that these facts only relate to 1980 and that "doing business" requires current presence in the state. *See Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U.S. 516, 517 (1923). Although AG itself admits that International continued to buy from AG and to sell to AG in 1981, see Ryan Affidavit at ¶ 19, the mere fact that the two companies continued to trade is insufficient. We must also be able to infer that the underlying relationship between AG and International continued unchanged. We find that the inference of a continued pattern cannot easily be made on the present record which, of course, includes affidavits submitted by AG that assert that all dealings between the two companies took place at arm's length. The credibility of AG's two affiants would have to be tested before we could determine whether AG has met its burden of persuasion.

If "doing business" were the only ground for jurisdiction in this case, we would either require a hearing[1] or quash the subpoena, granting leave to renew in the event that the Government could supply the Court with additional information. The discussion of the second ground for jurisdiction will show why neither of these actions need be taken.

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1 At oral argument, both parties disclaimed the need for or appropriateness of such a hearing.

2. *"Transaction of Business".*

The Government contends that past transactions can form the basis of jurisdiction because the acts which occurred in this state are the subject of the grand jury investigation. In support of this contention, the Government cites civil cases in which the plaintiff's cause of action arose out of the acts in this state. AG argues that a grand jury's subpoena power can only be exerted over persons and corporations present in the state, except in the case of American nationals or residents, pursuant to the statutory authority of 28 U.S.C. § 1783.

AG further contends that isolated acts have never been used to form the basis of grand jury subpoena power and insists that we must adhere to the model which equates jurisdiction with territoriality and power. *See McDonald* v. *Mabee,* 243 U.S. 90, 91 (1917) (Holmes, J.) ("The foundation of jurisdiction is physical power."). The Government assumes it is perfectly obvious that past acts can form the basis for jurisdiction in this case and dwells chiefly on the subject of the constitutional requirement of fairness.

Before we reach the constitutional question of fairness, we must determine whether state law provides for personal jurisdiction in this case. In considering whether the "transaction of business" is a sufficient basis for the assertion of jurisdiction, we naturally turn to the New York long arm statute. N.Y.Civ.Prac. Law § 302(a)(1). We then note that this statute permits jurisdiction "[a]s to a *cause of action* arising from" the transaction of business in this state." *Id.* (emphasis added). Although, in the context of this proceeding, we do not have a civil "cause of action", the statute nevertheless reflects a legislative determination that it is appropriate to require a person who has acted in this state to appear and account for his actions here. It is certainly consistent with this policy to require a corporation to produce documents for a grand jury that is investigating specific actions carried out in this state. In other words, the statute reveals a legislative intent to confer jurisdiction where the subject matter of the litigation is related to the contacts with the jurisdiction. Applying this standard in the context of the grand jury, we find that if the subject matter of the investigation is related to the contacts with the jurisdic-

tion, the grand jury's exercise of its subpoena power should not be invalidated by the court.

The Government has shown a good faith basis for its assertion of this ground of jurisdiction. It has shown that the grand jury is investigating particular transactions in which International allegedly acted on AG's behalf in this state. It has presented affidavits which support its allegations that International directed income from the resale of oil purchased from AG offshore to AG, in a manner designed to avoid United States taxes. These alleged transactions on behalf of AG would undoubtedly provide the minimum contacts needed to comport with "traditional notions of fair play and substantial justice" required by due process. *See International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

The Government having shown a good faith basis for its assertion of jurisdiction, the burden shifts to AG to persuade the Court that the transactions between the two companies took place at arm's length. In deciding whether AG has met its burden, we again take into account that AG lacks some details about the Government assertions. As stated above, AG has not explained the massive losses incurred by International, and has thus not met its burden of proof. The Court, therefore, will not quash the subpoena on the ground that service upon International was ineffectual.

C. *Swiss Penal Law*

The only remaining question is whether the Swiss statute that bars the disclosure of a "business secret" to "a foreign government" requires this Court to quash the subpoena.[2] AG

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2 Article 273 of the Penal Code of Switzerland provides:

"Economic Espionage

A person who spies out a manufacturing or business secret to make it accessible to a foreign governmental authority or to a foreign organization or to a foreign private enterprise or their agents,

a person who discloses a manufacturing or business secret to a foreign governmental authority or to a foreign organization or to a foreign private enterprise or their agents,

shall be punished with prison, in severe cases with jail. The imprisonment may be combined with a fine."

has submitted the affidavit of Dr. Peter B. Forstmoser, a professor of law at the University of Zurich and an attorney admitted to practice in Zurich, Switzerland. Forstmoser has "considered the list of demanded documents [in the subpoena] in the light of governing Swiss law," and it is his "clear and certain opinion that delivery of these documents to American authorities . . . would constitute a violation or violations by AG of art. 273 of the penal code of Switzerland. . . ." Forstmoser affidavit at ¶ 2.

When compliance with a grand jury subpoena would violate the law of a foreign nation, the court must balance the interests of the United States and the foreign nation, taking into account the following factors:

> " '(a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.' "

*United States* v. *First National City Bank*, 396 F.2d 897, 902 (2d Cir. 1968) (citing Restatement (2d), Foreign Relations Law of the United States, § 40 (1965)). Although the fact that the foreign nation threatens criminal penalties raises strong concerns about the hardship that would be imposed if the subpoena is upheld, courts will nevertheless uphold the subpoena if the interests of the United States are strong. *S.E.C.* v. *Banca Della Svizzera Italiana*, 92 F.R.D. 111, 116-117 (S.D.N.Y. 1981). *See also Societe International Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958).

We think that the interest of the United States in investigating violations of its tax laws outweighs the Swiss interest in

avoiding possible disclosure of business secrets in this case. The Government has made a substantial showing indicating that AG used its United States subsidiary to convey income to it overseas in circumvention of United States tax laws. To permit AG to shield this conduct from the scrutiny of the grand jury would be a "travesty of justice." *See S.E.C.* v. *Banco Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981). It is also highly significant that the Swiss government has not intervened in this matter to defend any national interests. *See United States* v. *First National City Bank*, 396 F.2d 897, 904 (2d Cir. 1968).

Most of AG's argument directed at tilting the balance in favor of Swiss law is aimed at denigrating the United States' interest. AG essentially repeats its jurisdiction argument: since AG had no contact with this country, the United States should have little interest in obtaining the requested disclosure. Obviously, our findings above relating to jurisdiction undermine this argument.

Having considered the other factors in this case, the Court finds that the Swiss penal statute in question should not bar the disclosure sought by the grand jury.

## *CONCLUSION*

AG's motion to quash the grand jury's subpoena duces tecum is denied. Since this opinion relates to a proceeding ancillary to a grand jury matter, we will order the opinion sealed until further order of this Court.

SO ORDERED.

Dated: New York, New York
August 25, 1982

LEONARD B. SAND

U.S.D.J.

## APPENDIX C

**Order of the United States District Court for the Southern District of New York entered September 3, 1982**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
M-11-188

IN THE MATTER OF
A GRAND JURY SUBPOENA DIRECTED TO
MARC RICH & CO. A.G., A SWISS CORPORATION

ORDER

Pursuant to the Court's Opinion dated August 25, 1982 denying Marc Rich & Co. A.G.'s motion to quash a grand jury subpoena, IT IS HEREBY ORDERED AND ADJUDGED that:

Any duly authorized custodian of records for Marc Rich & Co. A.G. produce to the grand jury on September 13, 1982 at 10:00 a.m. in Room 1401, United States Courthouse, Foley Square, New York, New York the records called for in the April 15, 1982 subpoena duces tecum directed to Marc Rich & Co. A.G.

SO ORDERED

LEONARD B. SAND

Leonard B. Sand
United States District Judge

Dated: New York, New York
September 3, 1982

## APPENDIX D

**Order of the United States District Court for the Southern District of New York entered September 14, 1982**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M-11-188

IN THE MATTER OF

MARC RICH & CO. A.G., A SWISS CORPORATION,

CONTEMPT PROCEEDING UNDER TITLE 28,
United States Code, Section 1826(a)

*ORDER*

Marc Rich & Co. A.G., having been subpoenaed to appear before a federal grand jury in the Southern District of New York to produce various records called for in an April 15, 1982 subpoena duces tecum and having been ordered by the Court on September 2, 1982 to designate a duly authorized custodian of records to appear before the July 13, 1982 Special Grand Jury on September 13, 1982, to produce the records called for in the April 15, 1982 subpoena duces tecum and Marc Rich & Co. A.G. having on September 13, 1982, refused to comply with the Court's September 2, 1982 Order to produce the records to the Grand Jury, and application having been made by the Government for an order of confinement or other sanctions pursuant to Title 28, United States Code, Section 1826(a), and the Court being satisfied that Marc Rich & Co.

A.G. has unlawfully refused without just cause shown to comply with the Order of this Court with full understanding of its obligation to so comply, it is hereby ORDERED AND ADJUDGED that:

1. Marc Rich & Co. A.G. is in civil contempt under Title 28, United States Code, Section 1826(a) pursuant to which the Court imposes a fine of $50,000 per day until Marc Rich & Co. A.G. is willing to comply with the order of this Court and to produce the documents called for or until the expiration of the term of said Grand Jury or until March 13, 1984, whichever first occurs;

2. The imposition of said fine is stayed until such time as the mandate of the Court of Appeals regarding an appeal from this Order is issued, such stay being subject to the following conditions:

a) A Notice of Appeal is to be filed by Marc Rich & Co. A.G. by September 14, 1982; and

b) Marc Rich & Co. A.G. will join with the Government in a motion to expedite the appeal, with the appellant's brief to be filed on or before September 22, 1982, and the Government's brief to be filed on or before October 4, 1982.

3. The sanctions ordered by the Court are without prejudice to any application by the Government to increase the monetary amount of the fine and/or to direct incarceration of an individual who would be an appropriate person to effect compliance with the April 15, 1982 subpoena duces tecum.

Dated: New York, New York
September 13, 1982

LEONARD B. SAND

Honorable Leonard B. Sand
United States District Judge